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No. 01-1243

In the
Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROBIN L. RIVETT
Counsel of Record
M. REED HOPPER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation

27 pp

QUESTIONS PRESENTED

1. Does deep plowing of normally dry, seasonally wet ranch land, which involves turning over dirt in place, constitute the addition of a pollutant under Section 404 of the Clean Water Act?

2. Does Section 404 require a permit for deep plowing of normally dry, seasonally wet ranch land, to plant deep-rooted crops, when the Clean Water Act expressly exempts normal farming and ranching activities, such as plowing, from such permit requirements?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, the California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of the Petition for a Writ of Certiorari.[1] Written consent for amici curiae participation in this case was granted by counsel of record for all parties.

The California Farm Bureau Federation (CFBF) is a nonprofit, tax-exempt California corporation. Its members are 53 county farm bureaus located throughout California through which it represents owners and operators of farms and ranches, as well as other residents of the state who are interested in the welfare of agriculture. CFBF represents approximately 43,000 California farm families who grow over 250 kinds of crops. Many of these families farm on lands that contain the types of seasonally wet ranch lands at issue in this case. If the Ninth Circuit's decision in this case is not overturned, these families will no longer be allowed to choose what crop they wish to grow if the crop requires deep plowing.[2] Instead they will have to seek approval from the federal government. Not only was this requirement never intended by Congress, but having to seek time delaying approvals is devastatingly incompatible with the day to day needs of normal farming operations.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

[2] Deep plowing occurs where a crop needs irrigation water to penetrate through the soil, but the soil is too highly compacted without the plowing. Deep plowing is often needed to convert land from less-intensive agriculture, such as grazing, to more intensive agriculture, such as orchards, vineyards, alfalfa, and certain vegetable crops. This kind of plowing is done at depths greater than 16 inches and can exceed 4 feet. *See* n.23 *infra*.

California agriculture has a tremendous impact on the lives of individuals throughout the world. If California were a country, it would be the sixth leading agricultural exporter in the world.[3] California is home to eight of the top ten United States farm counties[4] and in every single one of them deep plowing is a long practiced, normal farming activity.[5] California's top four farm exports—almonds, wine, cotton, and table grapes[6]—all require deep plowing prior to planting.[7] Besides producing all of the nation's almonds, California is the nation's sole producer (99% or more) of figs, kiwi fruit, olives,

[3] Department of Water Resources, *California Water Plan Update Bulletin 160-98*, Vol. 1, 1-4 (1998).

[4] United States Department of Agriculture, National Agricultural Service, 1997 Census of Agriculture, AC 97-S-2, *Ranking of States and Counties*, 27, Vol. 2, Subject Series Part 2.

[5] Interview with Hal Collin, President of Agri-Struction (March 15, 2002), a family-owned agricultural land improvement company in business since 1934. Deep plowing allows for better water penetration which in turn allows the roots of the crop to grow deeper. This provides for more stability in tree and vine crops. It also results in better yields, better quality, more efficient use of the water applied to the crop, recharging the ground water, and more efficient utilization of fertilizers and agricultural chemicals that are applied to the crop. *Id.* *See also* University of California Cooperative Extension, *Managing and Modifying Problem Soils* 4-6 (1974).

[6] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* 34 (2001).

[7] *See* University of California, Division of Agricultural Sciences, Leaflet No. 2946, *How to Appraise Soil Physical Factors for Irrigated Vineyards* (1977); University of California Cooperative Extension, *Sample Costs to Establish an Almond Orchard and Produce Almonds* 3 (2001); University of California Cooperative Extension, *California Cotton Review* 5-6 (Sept. 1977).

persimmons, pistachios, prunes, raisins, and walnuts,[8] each of which also often requires deep plowing prior to planting particularly in areas like California's Central Valley that contain clay soils.[9] Nectarines, peaches, plums, oranges, apples, pears, gueros and jalapeno chili peppers, lettuce, all nut crops, loose leaf lettuce, and alfalfa often require deep plowing too.[10]

The California Cattlemen's Association (CCA) is a nonprofit, tax-exempt California corporation. CCA represents the majority of the California cattle industry and nearly 2000 ranching families statewide. California ranchers own over 20% of the private land in this state, and cattle grazing in general occurs on over 37% of the land mass in the state.[11] CCA, like CFBF, is deeply concerned that the Corps of Engineers' exercise of Section 404 permitting jurisdiction over the deep plowing of the usually dry, seasonally wet ranch land at issue in this case, will have severe economic consequences on the

[8] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* 33.

[9] Interview with Hal Collin, President of Agri-Struction (March 15, 2002). *See also* University of California Cooperative Extension , *Sample Costs to Establish a Fig Orchard and Produce Figs* 4 (1994); University of California Cooperative Extension, *Sample Costs to Establish a Manzanillo Olive Orchard and Produce Olives* 4 (1997); University of California Cooperative Extension, *Sample Costs to Establish a Prune Orchard and Produce Prunes* 4 (1997).

[10] *See* University of California Cooperative Extension, *Sample Costs to Establish an Orange Orchard and Produce Oranges* 4 (1999); University of California Cooperative Extension, *Sample Costs to Establish an Apple Orchard and Produce Apples* 3 (1994); University of California Cooperative Extension, *Production Practices and Sample Costs to Produce Loose Leaf Lettuce* 3 (1996); University of California Cooperative Extension, *Sample Costs to Establish a Pecan Orchard and Produce Pecans* 4 (1998).

[11] http://www.calcattlemen.org/aboutcca.htm (last visited April 10, 2002).

state's agricultural industry. Vernal pools[12] and drainage swales[13] are pervasive throughout California's ranch lands. Many CCA members are terrified that their ability to continue to graze and grow crops on their lands, indeed their very right to maintain viable agricultural operations, will be seriously undermined if the common activity of deep plowing in these areas may not go forward without a permit from federal bureaucrats.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Litigating nationwide since 1973, PLF provides a voice in the courts for thousands of Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska. PLF has participated in numerous cases across the country concerning the interpretation of the Clean Water Act and its restrictions on landowners' rights to use their private property in a reasonable, productive manner.

The ranchers and farmers amici represent are faced with ever increasing demands to improve profitability or convert their lands from agriculture to other uses. For instance, between 1964 and 1997, the amount of land used for agriculture in this country dropped about 16% to less than 932 million

[12] Vernal pools are not at issue in this case. *Borden Ranch Partnership v. Army Corps of Engineers*, 261 F.3d 810, 816 (9th Cir. 2001).

[13] Drainage swales are "shallow linear features ranging from several inches to several feet wide, and up to several hundred feet long—which exist and carry stormwater runoff for brief periods only during and after seasonal rains, and which ultimately drain to intermittent streams." Pet. for a Writ of Certiorari at 6.

acres.[14] In California, the most productive agricultural state in the country,[15] agricultural land use dropped by well over 9 million acres during the same period—37 million to 27.7 million acres, a 25% reduction.[16] Between 1988 and 1998 over 420,240 acres in agricultural production were converted to urban and built up uses.[17]

However, the Ninth Circuit's majority decision below ignored the intent of Congress not to impede normal farming activities with the Clean Water Act Section 404 program,[18] but has instead provided additional burdens that will force more and more farm land into nonagricultural uses. For example, if Parkfield, California, rancher and farmer Kevin Kester had been unable to convert 51 acres of his grazing land in 1998 to vineyards, he would have been forced to sell some of his land for nonagricultural uses.[19] The conversion from rangeland to fully planted vineyards enabled Mr. Kester to obtain an

[14] Nicolai V. Kumiroff, Daniel A. Sumner & George Goldman, *The Measure of California Agriculture 2000*, University of California Agricultural Issues Center, November, 2000, at 11.

[15] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* 30.

[16] "Over a quarter of California's landmass is used for agriculture (down from over a third as recently as 1964). Just over half of the 27.7 million acres of agricultural land is pasture and range and about 39% is cropland. Most California farms are small in terms of cash receipts and total sales, and are family or individually operated. California has a greater share of female farm operators and farms with Hispanic, Asian and Pacific Islander backgrounds than the United States as a whole."

Kumiroff, *et al.*, at 7.

[17] Kumiroff, *et al.*, at 16.

[18] *See* n.29, *infra* at 16.

[19] Interview of Kevin Kester (March 12, 2002).

increased cash flow needed to pay estate taxes and avoid the need to sell off part of his property. However, if Mr. Kester had been subject to the Ninth Circuit's *Borden Ranch* decision, he would not have been able to take this action in a timely manner, if at all. It could have taken well over a year just to get the Section 404 permit needed to make the conversion.[20] However, because the *Borden Ranch* decision did not apply to his operation, he was able to act in a timely manner and keep all his acres in agriculture.[21]

This pressure to sell off land is a troubling scenario that is repeating itself time and again. Farmers must retain flexibility in their operations and an ability to make decisions quickly so they can withstand the tremendous economic and societal pressures arrayed against them. Estate taxes, property taxes, market conditions, urban encroachment, changes in water availability, environmental regulation, and a host of tensions work against farming. The Ninth Circuit's decision that the federal government can regulate normal deep plowing under Section 404 was never intended by Congress but is now one more, possibly insurmountable, burden for a number of family farmers in this country.

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[20] One study showed that the average amount of time necessary to obtain a Section 404 permit was 373 days. Bernard Goode & Virginia Albrecht, *Wetland Regulation in the Real World*, ALI-ABA Course of Study Materials, Vol. 1 (February, 1994).

[21] Farms provide significant open space and ecologically valuable habitat for local flora and fauna. Indeed, 75% of the nation's wildlife lives on farms and ranches. California Farm Bureau Federation, *Facts & Stats About California Agriculture* (2002).

STATEMENT OF FACTS

In 1993, Borden Ranch Partnership acquired an 8,400-acre ranch in the Central Valley of California.[22] This land had been used previously for cattle grazing, irrigated pasture, and growing wheat, hay, alfalfa, and row crops. Borden Ranch acquired the land to continue farming it and introduce higher value vineyard and orchard crops. Pet. at 9.

Much of the soils on the ranch were heavily compacted and if not subjected to the common soil preparation practice of deep plowing, would not allow adequate penetration of irrigation water needed for vineyard or orchard crops. Deep plowing loosens and mixes—virtually in place—the compacted soils to a depth of four to six feet. It breaks through the hard soil to allow the percolation of irrigation water.[23]

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[22] The Central Valley has over one half of California's agricultural land. The Valley, with about 64% of California's cropland, recorded 44% of statewide cropland conversion out of agriculture between 1988 and 1998. Valley grazing land, about 44% of state total, contributed 27% of total grazing land conversions. Kumiroff, *et al.*, at 19.

[23] The Corps describes deep plowing, which it calls deep-ripping, as

> the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers. These practices are typically used to break up these subsoil layers (e.g., impermeable soil layer, hardpan) as part of the initial preparation of the soil to establish an agricultural or silvicultural operation. Deep-ripping and related activities are also used in established farming operations to break up highly compacted soil. Although deep-ripping and related activities may be required more than once, the activity is typically not an annual practice. Deep-ripping and related activities are undertaken to improve site drainage and facilitate deep root growth, and often occur to depths greater than 16 inches and, in some cases, exceeding 4 feet below the surface . . . .

(continued...)

The Corps objected to Borden Ranch's deep plowing in areas the Corps contends contain waters of the United States (seasonal drainages). The Corps charged that without a permit, the deep plowing in these areas constitutes a discharge of dredged or fill material prohibited by Section 404 of the Clean Water Act. The lower courts agreed with the Corps. (*See* Pet. at 9-15, for a detailed explanation of the facts in this case.)

Whether a Section 404 permit is required for the normal, deep plowing that farmers must do for a variety of crops is an exceptionally important question of law. The Ninth Circuit's answer that it does require a permit is contrary to the plain language and legislative history of the Clean Water Act. The Corps has no jurisdiction under the Clean Water Act to regulate Borden Ranch's plowing, whether it be shallow or deep because Congress never sought to have the federal government control what crops a farmer may plant. However, if left intact, the Ninth Circuit's nonsensical decision will provide that authority and, in the course, seriously hurt farming in California and this nation.

SUMMARY OF ARGUMENT

Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the Corps[24] to require permits for those activities that "discharge" or "add" a "pollutant" from a "point source" into waters of the United States. Section 404 expressly exempts from this permitting requirement "normal farming and ranching activities, such as plowing," which do not convert an area of water "into a use to which it was not previously subject." 33 U.S.C. § 1344(f). This case involves a question of great

[23] (...continued)
Regulatory Guidance Letter No. 96-02, *Applicability of Exemptions Under Section 404(4) to "Deep Ripping" Activities in Wetlands* (December 12, 1996).

[24] The Environmental Protection Agency (EPA) oversees the Corps' enforcement of Section 404. 33 U.S.C. § 1344(c); 40 C.F.R. pt 231.

importance to the farmers of this country: does the Corps have jurisdiction under Section 404 to prohibit a farmer from the normal farming activity of deep plowing his soil so he can grow the crop of his choice? The Ninth Circuit ruled that the Corps did have jurisdiction over deep plowing and in so doing created not only a conflict among the circuits, but also established a direct contradiction with the express language of the Clean Water Act and Congressional intent.

The Ninth Circuit's finding that the Corps has section 404 jurisdiction over deep plowing is in conflict with *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998). There the District of Columbia Circuit held that incidental fallback of dirt into wetlands during dredging activities is not an addition of a pollutant and therefore is not subject to the Corps' section 404 regulation. Deep plowing, which does not even remove soil from the ground, is at most a type of incidental fallback that adds no more of a pollutant to waters of the United States than the fallback in *National Mining*. Additionally, the Ninth Circuit's finding that the normal farming activity of deep plowing is not exempt from Section 404 regulation contradicts both the Clean Water Act, 33 U.S.C. § 1344(f), and the Corps' own regulations, 33 C.F.R § 323.4(1)(iii)(D). It also conflicts with Congressional history. Each of these sources establishes that the normal activity of plowing was never intended to be subject to section 404 regulation. Nevertheless, through an expansive regulatory interpretation of its authority, the Corps has taken the position that it can stop a farmer from turning over even a shovel full of dirt on his usually dry ranch land.[25]

[25] One scholarly article evaluated the continuing expansion of the Corps' jurisdiction and described it as "broadened by liberal interpretation of wetlands physiology." It cited with approval Judge Merrit from the Sixth Circuit who stated in *United States v. Larkins*, 852 F.2d 189, 193-94 (6th Cir. 1988) (Merrit, C.J. concurring) that "the Corps has now expanded the (continued...)

This Court should grant the Petition for a Writ of Certiorari to eliminate this conflict between circuits and to rein in the Corps' unauthorized exercise of section 404 jurisdiction. Otherwise, the future of family farming in this country will be bleak indeed.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE CONFLICT AND CONFUSION AMONG THE CIRCUITS

A critical question in this case is whether deep plowing normally dry, seasonally wet ranch land **adds** a pollutant to waters of the United States. Without such a finding, the Corps has no Section 404 permitting jurisdiction over Borden Ranch and other similar farm operations. This Court has provided no definitive answer to this question while the circuits show no consistency in confronting the issue.[26] We are left only with a circuit conflict which needs to be resolved.

For plowing to be controlled by Section 404, it must involve the "discharge of dredged or fill material into the

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[25] (...continued)
definition of 'navigable waters' to include any creek or stream or moist area . . . . A farmer's low-lying farmland or a homeowner's low-lying backyard—adjacent to a small stream or creek, but many miles from a navigable waterway—has apparently been converted into government property no longer subject to control or improvement by the owner without government permission." Bianucci & Goodenow, *The Impact of Section 404 of the Clean Water Act on Agricultural Land Use*, 10 UCLA J. Envtl. L. & Pol'y 41 (1991).

[26] "The effect of the *National Mining* decision [no Section 404 jurisdiction over incidental fallback] on holdings in other courts has been ambiguous." Morrison, Administrative Law; Clean Water Act: *National Mining Association v. Army Corps of Engineers*, 27 Ecology Law Quarterly 649, 663-4 (2000).

navigable waters[27] at specified disposal sites." 33 U.S.C. § 1344(a). This is a specific requirement derived from Section 301(a) of the Act which prohibits the "discharge of any pollutant" unless in compliance with the permit (e.g., Section 404) requirements of the Act. 33 U.S.C. § 1311(a). The term "pollutant" includes "dredged spoil, . . . rock, sand, cellar dirt . . . and agricultural waste discharged into water," 33 U.S.C. § 1362(6), and has been interpreted by the courts to include soil. *United States v. Wilson*, 133 F.3d 251, 259 (4th Cir. 1997), *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983). Thus, soil is a pollutant and can be

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[27] The Clean Water Act defines navigable waters only as "the waters of the United States, including the territorial seas," § 1362(7). This Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)* 531 U.S. 159 (2001), addressed whether the Corps' definition of "waters of the United States" in 33 C.F.R. § 323.2(a)(5) (1978), was what Congress intended. This Court found that the regulation read the term "navigable" out of the definition by expanding "waters of the United States" to include "isolated wetlands" and later, "intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters of the United States, the degradation of which could affect interstate commerce." 33 C.F.R. § 323.2(a)(5). This Court earlier found Section 404 jurisdiction over nonnavigable wetlands located *directly adjacent* to open waters, *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985), but in *SWANCC* the Court refused to expand jurisdiction per the Corps' regulation to "isolated wetlands" not adjacent to open water bodies. To do so would make a nullity of the word "navigable" as used in the Clean Water Act. *SWANCC*, 531 U.S. at 172.

While this Court did not address jurisdiction over the types of "wetlands" now involved in this case, Amici strongly believe that this Court's reasoning in *SWANCC* should also bring into question the Corps' Section 404 jurisdiction over the "widely dispersed seasonal drainage swales and intermittant drainages" on the "semi-arid Borden Ranch." Pet. at 6. This Court recognized that Congress may have intended Section 404 to cover only "waters adjacent to 'navigable waters,' such as nonnavigable tributaries and streams." *SWANCC*, 531 U.S. at 171. Borden Ranch did not enter any tributaries or streams but confined its plowing to less than a collective 2 acres of normally dry areas where rainwater collected or flowed downhill. Thus, Amici believe the plowing in this case did not involve any jurisdictional waters of the United States.

"dredged or fill material" subject to Section 404. However, for "plowing" to be controlled by Section 404, it must also involve the "discharge" of dredged or fill material.

The Act defines the "discharge of a pollutant" as "any **addition** of any pollutant [or pollutants] to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). Accordingly, the terms "addition" and "point source" also must be satisfied for plowing to come under Section 404 control. Unfortunately, the Act does not define the term "addition," although it does define "point source" as any discernable, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.[28] 33 U.S.C. § 1362(14).

The Corps concluded that Borden Ranch's plowing is subject to Section 404 control because it causes the *addition* of a *pollutant* (dirt) from a *point source* (plow) *into navigable waters* (normally dry, seasonally wet ranch land) at *specified disposal sites* (the plowed ranch land). The Ninth Circuit agreed, ruling that the plowing here constitutes an "addition" of a pollutant. *Borden Ranch*, 261 F.3d at 814. But this finding and the court's reasoning *conflict* with the District of Columbia

[28] Amici agree with Petitioners that a plow has never been characterized before as a "point source" (Pet. at 20) and by doing so the lower court has put the nation's farmers in a tenuous situation. When they plow a wet area, must they first obtain permission from the Corps? Amici agree with petitioners that the majority decision below improperly analogizes the plows used by Borden Ranch to the bulldozers and backhoes previously found to constitute point sources. In those latter instances, that machinery was used for clearing the land by significant soil movement, leveling, and filling sloughs and cutting brush and vegetation at ground level. *See Avoyelles*, 715 F.2d at 923. However, that machinery was not used just to turn over and break up soil as was the machinery in this case. Thus, the lower court's likening of the machinery used to remove, redistribute, and pile dirt in wetlands to machinery used only to mix and loosen the soil in place is faulty.

Circuit's decision in *National Mining Association*, 145 F.3d 1399. In that case, the Corps sought to regulate under Section 404 the removal of soil from a wetland area where, during removal, some of the dirt would fall back onto the wetland. The court found that

> the straightforward statutory term "additions" cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.

Id. at 1404. Of course, **plowing** also is not an act of discharge or adding pollutants to a wetland. It is an act of "breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops." 33 C.F.R. § 323.4(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). All plowing involves nothing more than the "incidental fall back" of soil that is being broken up and turned over. It "adds" nothing to the land.

However, rather than recognize *National Mining Association* as controlling, the court instead found Borden Ranch was governed by two completely inapposite cases, one in the Ninth and one in the Fourth Circuit. *See Borden Ranch*, 261 F.3d at 814. In those cases, soils had been removed by buckets from waters and wetlands and then later redeposited into those areas. In *Rybachek v. United States Environmental Protection Agency*, 904 F.2d 1276 (9th Cir. 1990), a placer miner excavated dirt and gravel from a stream bed to an out of stream location, sifted out the gold, and later disposed of the leftover waste material by redepositing it back into the stream. This is not comparable to the instant situation. Borden Ranch did not remove the soil, change its character, and redeposit the spoils. To the contrary, Borden Ranch simply turned the dirt over in place. Borden Ranch added no pollutant by its deep

plowing. As Judge Gould explained in his dissent in this case, deep plowing "does not involve any significant removal or 'addition' of material to a site." *Borden Ranch*, 261 F.3d at 820. Moreover, "[b]ecause deep [plowing] does not move any material to a substantially different geographic location and does not process such material for any period of time, *Rybacheck* is not controlling." *Id.*

The second case relied on by the majority, *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), is no more persuasive. In that case, a landowner excavated a drainage ditch in wetlands and sidecast the dredged material onto the wetlands bank alongside the ditch. The court adopted the position that once material is removed from a wetland it becomes a pollutant, and its redeposit becomes an addition of a pollutant subject to Section 404. *Id.* at 335-36. Under this creative reasoning, the majority in this case found deep plowing was analogous to *Deaton*'s sidecasting although there was no removal and redepositing of the dirt. *Borden Ranch*, 261 F.3d at 814. In contrast, dissenting Judge Gould once again found *National Mining Association* more persuasive stating, "[a] farmer who plows deeply is not, in my view, redepositing dredged or excavated materials." *Id.* at 820.

Thus, the reasoning of the Ninth Circuit majority in this case squarely conflicts with the reasoning of the D.C. Circuit in *National Mining Association.* This underscores a clear conflict as to which circuit's decision controls "deep plowing." This Court should grant certiorari to clear up this conflict. Does deep plowing on normally dry, seasonally wet ranch land **add** a pollutant to the nation's waters subjecting it to Section 404 regulation? Amici emphatically believe it does not, but without Supreme Court intervention regulation of this common agricultural practice will continue as a serious detriment to farmers nationwide.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO ADDRESS THE IMPORTANT QUESTION OF WHETHER PLOWING RANCH LAND IS EXPRESSLY EXEMPT FROM SECTION 404 REGULATION

The Ninth Circuit's determination that the Corps has Section 404 permitting jurisdiction over Borden Ranch's seasonally wet ranch land raises another serious question that needs to be resolved. Is plowing such land that has a history of uninterrupted agricultural use exempt from Section 404 regulation where the purpose of the plowing is to plant a new crop that needs better percolating soil? As shown earlier, *supra* at 2-5, ranchers and farmers regularly convert from one crop to another as part of normal farming operations. Economic exigencies often call for it. Congress knew this and wanted to make sure such management decisions were not encumbered by Section 404. In fact, because Congress "emphatically did not want the law to impede these bucolic pursuits," *National Mining Association*, 145 F.3d at 1405, Congress passed amendments to the Clean Water Act in 1977 adding specific exemptions for farming activities.[29]

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[29] Congressman Roberts explained that due to the regulatory expansion of the Section 404 program since its 1972 inception, the bill "excluded from regulation normal ranching activities." *A Legislative History of the Clean Water Act of 1977*, Vol. 3 (1978); House debate, December 17, 1977, *Report on Resolution Providing For Consideration of Conference Report on HR 3199*, Clean Water Act of 1977 at 351 (hereinafter Clean Water Act Legislative History). Congressman Hammerschmidt further clarified that

> we will now have for the first time statutory recognition that normal farming, ranching and silviculture activities do not belong in this permit program. These exemptions reemphasize that Congress never intended these activities to be considered discharges of dredged or fill material. *Id.* at 349.

Congressman Stump explained that "[t]he conferees have clarified that plowing . . . [was] not intended to require Section 404 permits." *Id.* at 420.

(continued...)

Section 404 was amended to allow, without a permit, any discharge from normal farming, silviculture, and ranching activities such as **plowing**, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. 33 U.S.C. § 1344(f)(1)(A). This subsection does not limit itself to certain types of plowing but the Corps unilaterally decided in 1996, without formal rulemaking, that the deep plowing needed to prepare compacted soil for vineyards or orchards does not constitute a "normal farming" activity. (*See* Petitioner's Appendix 4, 199-207; RGL 96-02.) This new interpretation conflicts with the government's own regulations which recognize that plowing is not a Section 404 regulated activity and, hence, is a normal farming activity. *See* 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.3(c)(1)(i). When defining what the term "discharge of fill material" means, the Corps of Engineers categorically states that "the term does not include plowing." 33 C.F.R. § 323.2(e). EPA's regulatory definition for plowing, 40 C.F.R. § 232.3(D)(4), expresses the same conclusion:

> Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up,

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[29] (...continued)
Later in debate, conferee Senator Stafford further clarified the conference report explaining that

> the bill includes the clarification that permits are not required for certain normal farming activities such as plowing and seeding which are not discharges of dredged or fill material.

Id. at 485. He also explained that other farming activity that would "connect water to dry land including, for example, those occasional farm or forestry activities that involve dikes, levees or other fills in wetland or other waters," *activities unlike plowing*, would still require a permit. *Id.* And last, Senator Baker made it quite clear in debate that "activities . . . such as plowing . . . do not involve point source discharge of dredged or fill material." *Id.* at 524.

> cutting, turning over, or stirring of soil to prepare it for the planting of crops . . . . Plowing, as described above, will never involve a discharge of dredged or fill material.

Thus, all plowing, including deep plowing, must be a normal farming activity within the meaning of Section 404(f)(1)(A), or it *would not* be expressly excluded from the meaning of "discharge of dredged or fill material" by the Corps' and EPA's own regulations.

However, the court below found otherwise and also ruled that even if the deep plowing were exempt, Subsection (f)(2) provides an exception to the farming exemptions applied to Borden Ranch. *Borden Ranch*, 261 F.3d at 815. Subsection (f)(2) is known as the recapture provision. It states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.[30]

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[30] Once again, the application of Section 404 is limited by its express terms to "navigable waters." Under *SWANCC*, waters of the United States subject to Section 404 jurisdiction include wetlands adjacent to traditional navigable waters, possibly including adjacent nonnavigable tributaries and streams. 531 U.S. at 172. However, it is undisputed that Borden Ranch did not conduct plowing activities in wetlands adjacent to either traditional navigable waters or nonnavigable tributaries or streams. As expressed by the Fifth Circuit Court of Appeals in *Rice v. Harken Exploration Co.*, 250 F.3d 264, 271 (5th Cir. 2001), "it would be an unwarranted expansion of [the Clean Water Act] to find that discharges onto land that only infrequently carried running water were discharges into navigable waters." *See also United States v. Newdunn Associates*, Civ. No. 2:01cv508 (E.D. Va. Opinion and Order, April 3, 2002) (no Section 404 jurisdiction over surface

(continued...)

33 U.S.C. § 1344(f)(2) (footnote added).

The Ninth Circuit interpreted this subsection to negate the subsection (f)(1) plowing exemption if a farmer is changing his crop, for example, from seasonal hay or pasture grass to orchards or vineyards and the plowing causes "substantial hydrological alterations." *Borden Ranch*, 261 F.3d at 815-16 (citing *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986)). But the *Akers* decision never held that plowing solely done for the purpose of changing crops constituted "bringing an area [of the farm] into a use to which it was not previously subject." On the contrary, *Akers* dealt with converting a nonfarmable part of the farm known as the Big Swamp to uplands by massive dyke building, grading, leveling, and water diversion activities. *Akers*, 785 F.2d at 816. Borden Ranch's plowing activities were of a completely different nature, but nevertheless were treated by the Ninth Circuit as identical to *Akers*.

The court took the position, in essence, that under Section 404 it is not the farmer but the Corps that has the role of determining what crops may or may not be produced by the farmer. Under this interpretation, the government would control through the Section 404 permitting process all plowing on land with any type of seasonal, normally dry wetland area. If this is so, the 1977 farming exemptions are virtually meaningless. The Corps will have become the managing general partner of vast acreages of private farmland across the nation. But Congress never intended such agency authority. As this Court recognized in *SWANCC*, in addressing the jurisdictional scope of the Section 404 program, "[r]ather than

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[30] (...continued)
water that drains into a series of ditches that drain into navigable water body); *United States v. Rapanos*, 2002 U.S. Dist. LEXIS 3957 (E.D. Mich. S.D. February 21, 2002) (no Section 404 jurisdiction over wetlands draining into nonnavigable creeks that drain into navigable water body over 20 miles away).

expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve and protect the primary responsibilities and rights of states . . . to plan the development and use . . . of land and water resources' . . . 33 U.S.C. § 1251(b)." *SWANCC*, 531 U.S. at 174. The Ninth Circuit ignored this principle.

The Ninth Circuit's interpretation of the Section 404(f) exemption eliminates virtually any practical application of the exemption for farmers. This interpretation that includes plowing as a Section 404 regulated activity threatens the viability and independence of this nation's family farmers. This is an issue of great importance the Court should review.

CONCLUSION

Amici urge the Court to grant the Petition for a Writ of Certiorari.

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Respectfully submitted,

ROBIN L. RIVETT
Counsel of Record
M. REED HOPPER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae
California Farm Bureau
Federation, California
Cattlemen's Association, and
Pacific Legal Foundation